

REVIEW

Legal Theory and the Problem of Definition

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Natural Law and Natural Rights. JOHN FINNIS. The Clarendon Press, Oxford University Press, New York, 1980. Pp. xv, 425. \$39.50.

Natural Law and Natural Rights is a refreshingly direct book about some decidedly difficult matters. It is also a book that refuses to do homage to the complexity of its subject by limiting the topics covered. Here is virtually a mini-treatise in moral philosophy, with illuminating discussions on the whole range of human value¹ and on a good part of the related range of metaethics,² legal theory,³ political theory,⁴ and the problems of methodology in the

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¹ All of Part Two, but especially chapters III, IV, and V, discuss the basic forms of human value: life, knowledge, play, aesthetic experience, friendship, practical reasonableness, and "religion." See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 86-90 (1980). (By "religion" Finnis means not necessarily theistic belief and its expression, but thinking "reasonably and (where possible) correctly about . . . questions of the origins of cosmic order and of human freedom and reason—whatever the answers to those questions turn out to be" *Id.* at 89.) Finnis defends this list as exhaustive. *Id.* at 90-92.

² For particularly useful discussions of the meaning of some of our basic moral/legal concepts, see *id.* at 238-45 (discussing "custom"), 188-230 ("rights"), 231-59 ("authority"), 297-350 ("obligation"), and 378-88 (the idea of "God"). Even where the analysis is derivative (or otherwise not original with Finnis), it is almost always presented from a fresh viewpoint.

³ *Id.* chs. IX-XII. My interest in this essay is primarily in Finnis's legal theory. But Finnis himself describes his book, and quite correctly so, as a contribution mainly to moral theory. See *id.* at 18, 25, 276-81. As will be evident, I think the direction that Finnis has taken is of more potential significance for legal than for moral theory. Readers who are already familiar with Finnis's book and who are interested primarily in its implications for legal theory may wish to skip directly to parts II, III, IV, and V of this essay.

⁴ *Id.* chs. IX-XII, especially at 297-314, 354-63. By "political theory" I mean a theory about the moral foundations of a state that entails a view on the question whether there is any obligation to obey the law. As will appear, Finnis here is curiously inconsistent, first suggesting that there is always a *prima facie* obligation to obey, then making clear in the

descriptive social sciences.⁵

Such breadth of coverage in such relatively short space admittedly comes at the cost of easy reading. But Finnis repays study for several reasons. First, he speaks directly to matters contemporary philosophers seldom discuss. Of the questions that mark the domain of ethics—"what's good?" and "how can I know it?"—the latter question has long proved the more fascinating for modern minds, no doubt because of the seeming contrast between scientific and moral modes of "proof." Even those who do turn to the first question—"what *is* good?"—as often as not are soon sidetracked into questions about what "good" means or about how to describe the moral strategy (utilitarian, deontological) for discovering what's good. But Finnis is direct: he tells us what is good. He describes seven basic forms of human value⁶ and nine requirements of practical reasonableness⁷ that we use in pursuing (in Finnis's terms, "participating in") these forms. For comparison one reaches back to Aristotle (on whom Finnis draws extensively) for a similarly direct and illuminating confrontation with the substantive problems of ethics.

end that even a *prima facie* obligation exists only if law meets minimum moral requirements. See *infra* pp. 1182-84. The inconsistency is due to Finnis's timidity in connecting his political theory to his legal theory, though that timidity may itself be due to the fact that his political theory is incorrect, that is, it is too strongly restrictive of the obligation to obey the law. See *infra* pp. 1193-94.

⁵ *Id.* ch. I & at 357-59.

⁶ These are listed *supra* note 1.

⁷ By "practical reasonableness," Finnis means the ability to bring one's own intelligence to bear effectively (in practical reasoning that issues in action) on the problems of choosing one's actions and life-style and shaping one's own character. Negatively this involves . . . a measure of effective freedom; positively, it involves that one seeks to bring an intelligent and reasonable order into one's own actions and habits and practical attitudes.

J. FINNIS, *supra* note 1, at 88. Finnis offers these "requirements" of practical reasonableness:

(1) A "rational plan of life," ordering and harmonizing one's commitments to the basic values, *id.* at 103-05;

(2) No arbitrary preference among values, *id.* at 105-06;

(3) No arbitrary preference among persons, *id.* at 106-09;

(4) "Detachment" from the specific and limited projects that one has undertaken, *id.* at 109-10;

(5) Having made general commitments, the individual must not abandon them lightly, *id.* at 110;

(6) Efficiency in bringing about good; no wasting of opportunities through inefficiency, *id.* at 111-18;

(7) No choosing of an action that in itself does nothing but damage one of the basic values, although there might be good incidental consequences, *id.* at 118-25;

(8) Favoring and fostering the common good, *id.* at 125, 134-60;

(9) Following one's conscience, *id.* at 125-26.

See also *infra* notes 25-39 and accompanying text.

A second welcome feature of the book is its common-sense distillation of a variety of metaethical and epistemological debates that philosophers often pursue beyond the point of obvious significance to the intelligent layman. To give just one example, moral theorists debate at length the differences between (and conclusions to be drawn from the viewpoint of) the "ideal observer," or the "impartial spectator," or an "original position," or a "social contract."⁸ Finnis matter-of-factly assigns all of these to the same slot: heuristic devices that help us apply practical reason's injunction to exclude mere personal bias in making moral judgments—in short, modern versions of the Golden Rule.⁹

Third, in the specific debate within legal theory between positivism and its opponents, Finnis points toward a fresh approach that promises to dispel the sense of stagnation many must have in reviewing these continuing definitional disputes about the "nature" of law. The promise, however, remains unfulfilled. Much of this essay is directed at showing how to make sense of the new direction in legal theory that Finnis has only partly perceived.¹⁰

Finally, and perhaps most strikingly, the book presents us with a fine specimen of a species rarely found these days in Anglo-American jurisprudence, even more rarely in the Oxford milieu from which the work emerges: a full-blown natural law theory. The rarity of the species is due to two related factors. First, "natural law" suggests continued adherence to doctrines few continue openly to embrace. "Natural" suggests that values are being derived from facts. "Law" suggests that the ultimate source (and perhaps sanction for disregard) of such values lies in the will of some "law-giver"—God, for example. Second, the phrase "natural law"

* See, e.g., R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 225-29, 234-46 (1979) (comparing the ideal observer theory with Rawls's veil of ignorance). See generally sources cited in J. FINNIS, *supra* note 1, at 131 endnote V.4.

⁹ J. FINNIS, *supra* note 1, at 106-09, 131 endnote V.4. Finnis's description of all of these as "heuristic devices" for avoiding undue self-preference enables him to criticize misuse of the devices in some of their modern formulations. Thus Rawls's "original position" purports to justify as fair whatever is chosen under conditions that prevent awareness of actual self-interest. Finnis criticizes this device because it fails to show that principles not chosen under such a veil of ignorance would for that reason be unfair or improper principles of justice. A complete moral code must begin with reason and extensive knowledge of human nature, not with hypothetical choice-under-prescribed-conditions. Finnis thus adds his voice to those of others who have observed that the original position depends for its justification on a deeper appeal to reason or value. See, e.g., Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500 (1973).

For a related criticism of Rawls's distinction between "primary goods" and other kinds of goods, see J. FINNIS, *supra* note 1, at 105-06.

¹⁰ See *infra* parts III, IV, and V.

itself seems hopelessly vague—particularly if one denies the connotations just mentioned. Divorced of its “natural” meaning, it means too many things to too many people to hope for anything but confusion in calling a theory a “natural law” theory. Moreover, the phrase is ambiguous as well as vague. “Natural law” is sometimes used to refer to the specific doctrinal counterpart of legal positivism’s assertion of the separation of law and morals; at other times, it is used to refer to a particular kind of moral theory that on the surface has nothing to do with legal theory or legal positivism at all.

Professor Finnis confronts the first problem of unsavory connotations simply by declaring that his theory is free from all such connotations.¹¹ The second problem of ambiguity is not so clearly resolved. Though the book seems intent on presenting a legal as well as a moral theory, the latter completely eclipses the former and obscures the connection between the two.

I. NATURAL LAW AS MORAL THEORY

A. Helping a Theory by Definition

We discover what Finnis means by a natural-law moral theory in an early chapter¹² that combines a number of explicit affirmations. There are, says Finnis, a set of basic goods that are natural, not in the sense that they are logically derived from nature (the world of fact), but in the sense that they permit human flourishing. The “facts” of human psychology are relevant in determining the nature of man and thus what helps him to flourish.¹³ But the passage from such facts to conclusions about value occurs not by way of logical inference, but “by a simple act of non-inferential understanding.”¹⁴ This insistence on reason’s power to grasp goods directly, to make “a rational judgment about a general form of human well-being, about the fulfillment of a human potentiality,”¹⁵ frees the theory both from the implication that “ought” is being derived from “is” and from any necessary dependence on religious

¹¹ Finnis distinguishes writing a theory of natural law from writing an intellectual history of natural law theories. He puts his book in the former category and criticizes authors who have muddled this distinction. J. FINNIS, *supra* note 1, at 24-25, 25 n.1.

¹² *Id.* ch. II, especially at 23-25.

¹³ Indeed, how could they not be, since it is the good of man that we seek? See R. UNGER, *KNOWLEDGE AND POLITICS* 196 (1975) (“There is perhaps nothing to say to a man who would like to be a centaur.”).

¹⁴ J. FINNIS, *supra* note 1, at 34.

¹⁵ *Id.* at 72.

or transcendental propositions about the existence or will of God.

In what sense, then, is Finnis's still a "natural law" theory? Although he insists that his book is not "about" natural law in the sense of a history of various natural law theories,¹⁶ Finnis nevertheless takes the reader through a careful analysis of classical theorists (focusing primarily on Aquinas) to demonstrate that his particular version is not without antecedents. Indeed, Finnis makes a strong case for suggesting that subsequent misinterpretations of Aquinas were largely responsible for the objectionable images often associated with natural law.¹⁷ Having removed these images, Finnis's theory could just as easily be called a theory of "moral" or "human" rights—both contemporary idioms, as Finnis concedes, for what he calls "natural" rights.¹⁸ The upshot seems to be that a natural law theory is distinguished from other moral theories primarily by two features: 1) the claim that values are objective,¹⁹ and 2) the claim that we know such values directly through use of our natural faculties of reason.

This definition seems to eliminate only moral theories that deny that ethical propositions can be true or false or that insist on the ultimate "relativity" or "subjectivity" of all value statements. Among the things it does not seem to eliminate are most standard deontological or utilitarian theories. Bentham, after all, surely believed that his propositions about maximizing happiness were true propositions, knowable to man by a reasoned appreciation of the psychological and physical characteristics of human beings. Kant presumably thought that his theory yielded true and false ethical propositions based on man's rational nature, and that humans would "flourish" or not depending on whether they adhered to the moral code he produced.

Now there is nothing in a name per se, and Finnis certainly has historical support for using the term "natural law" so broadly that it includes almost any objective moral theory. Indeed, other contemporary philosophers considering the question of the meaning of "natural law" have reached a similar conclusion, suggesting that the phrase is "compatible with a variety of metaethics, whether metaphysical, theological, or empirical, rationalist or non-

¹⁶ *Id.* at 25. See also *supra* note 11 and accompanying text.

¹⁷ See, e.g., J. FINNIS, *supra* note 1, at 33-36, 42-48.

¹⁸ *Id.* at 198.

¹⁹ By "objective" Finnis seems to mean that the value judgment is "correct," *id.* at 75, and that it says something true about the world, rather than simply about the speaker's subjective attitudes and emotions. See *id.* at 69-73; see also *id.* at 72, 79 endnote III.5 (discussing J. Mackie).

rationalist, cognitivist or noncognitivist.”²⁰ Still, it is somewhat curious to realize that a group as diverse as Aquinas, Kant, and Bentham can all be viewed as “natural law” theorists.²¹ Moreover, in light of Finnis’s disclaimer that he is writing a “history” of natural law, one wonders why he hastens to give his particular version of “natural law” so detailed a historical pedigree. Why does he not simply call his theory a “moral theory,” thus avoiding the need to dispel at the start the connotations he confronts? Is it possible that by calling the theory a “natural law” theory, he takes advantage of the very connotations that he seemed anxious to deny, connotations that helped the classical theorists over the difficult problem that modern theorists face: namely, how do I prove what I claim reason has “grasped” (revealed?) in the realm of value?

B. Knowledge Without Proof

It is no accident that modern moral philosophy concentrates so arduously on the problem of proof. The claim that values are objective and knowable by reason seems to run counter to the apparent empirical evidence of value disagreement among human beings who are putatively equally rational. This empirical observation sets one to look for tests that, as in science, can confirm or verify true moral claims through experiments that yield the same results for all. Finnis’s response to the problem of apparent relativism takes two forms. First, as regards the basic forms of good, he denies the empirical claim:

²⁰ Frankena, *On Defining and Defending Natural Law*, in *LAW AND PHILOSOPHY* 200, 209 (S. Hook ed. 1964).

²¹ One might exclude Bentham and other consequentialists from the field by suggesting that natural law theories are characterized, not only by the claim of value-objectivity and by reliance on reason, but also by the subscription to certain absolute ethical principles, such as “everyone has a right to life.” Frankena seems to add this feature to his “definition” of natural law. *See id.* at 209. This feature might be thought to exclude Bentham, because even if a utilitarian theory did generate a right to life for everyone, it would be a contingent right, not an absolute: it would always be subject to being “outweighed” by consequences as circumstances change through time.

H.L.A. Hart provides a similar explanation to account for Bentham’s well-known antagonism to “natural rights,” despite his equally well-known adherence to an objective moral theory. *See* H.L.A. HART, *ESSAYS ON BENTHAM* ch. IV (1982). But this explanation seems inapplicable to at least some forms of utilitarianism—those, for example, that yield “absolute” rights on utilitarian grounds. In theory these rights may only be “rules of thumb,” subject to alteration if (but only if) relevant circumstances should change. But if the relevant circumstances are “human nature” itself, the utilitarian’s “absolute” rights are just as absolute as those provided by the natural law. In either case, a change in human nature might alter the basic values that would permit this new being to flourish. (Finnis seems to concede as much, although he puts the onus of proving such a change on those asserting its possibility. *See* J. FINNIS, *supra* note 1, at 50 endnote II.1.)

[A]ny sane person is capable of seeing that life, knowledge, fellowship, offspring, and a few other such basic aspects of human existence are, as such, good, i.e., worth having, leaving to one side all particular predicaments and implications, all assessments of relative importance, all moral demands, and in short, all questions whether and how one is to devote oneself to these goods.²²

Here, I think, Finnis is correct. As he notes, the assumption of wide variation among cultures in the choice of *basic* values has never been demonstrated. To the contrary, "philosophers who have recently sought to test this assumption, by surveying the anthropological literature (including the similar general surveys made by professional anthropologists), have found with striking unanimity that this assumption is unwarranted."²³

The situation changes, however, once we get beyond the basic values, which generate consensus perhaps just because they are so fundamental, isolated, and abstract.²⁴ In addition to the basic forms of good, Finnis describes nine "requirements of practical reasonableness."²⁵ These are methodological principles we use in moving from the very general description of goods to the practical solution required in specific cases: exactly what is the best "mix" of these goods for any particular person, and what should one do when these goods seem to conflict or when the choices available seem to leave no alternative but to sacrifice the good in question (save some lives at the expense of others)?

Some of these methodological principles are likely to be as uncontroversial as the list of basic goods (e.g., the requirement that there should be no arbitrary preference among persons²⁶). Others are not. Consider, for example, the requirement that each good be regarded as equally fundamental and be fully respected in every act.²⁷ According to this requirement, says Finnis, it is never permissible to kill an innocent person in order to prevent disastrous consequences, even if those consequences involve the lives of other innocents.²⁸ Any "intentional" killing, even as a means to prevent other deaths, is a direct choice against life (a basic value); the

²² J. FINNIS, *supra* note 1, at 30.

²³ *Id.* at 83.

²⁴ See the list of these basic values *supra* note 1.

²⁵ J. FINNIS, *supra* note 1, at 100-33. For a complete list of these requirements, see *supra* note 7.

²⁶ See J. FINNIS, *supra* note 1, at 106-09.

²⁷ See *id.* at 118-25.

²⁸ *Id.* at 119.

deaths of others, however foreseeable as a consequence of inaction, are not the result of one's own choice. Anyone familiar with the doctrine of double effect will realize that we have now moved from consensus to controversy—and bitter controversy at that.²⁹

Also controversial are Finnis's claims for the role of consequences in moral reasoning. As a requirement of practical reasonableness, efficiency requires paying some attention to the consequences of action.³⁰ But consequences cannot serve as the method for deciding in the first place which goals to pursue, which particular mix of goods is appropriate in light of the individual makeup of a particular person. Finnis reminds us here of a number of standard objections to utilitarianism (it cannot decide, except arbitrarily, whether it is my good or the good of others that is to be maximized,³¹ or whether it is average or total utility that we should maximize; it also wrongly permits choosing directly against basic values (e.g., innocent lives)).³² But Finnis also lodges what he perceives to be a more basic objection: the injunction to maximize the good is irrational because it assumes a standard unit by reference to which one can compare various states and decide which is best. In fact, he argues, the basic goods are incommensurable. There are many different ways for men to flourish, and it is impossible to compare these ways to determine which is "best."³³

Now this blanket condemnation of consequentialism is clearly a matter about which reasonable persons can disagree.³⁴ Moreover, the claim that consequentialism is irrational seems inconsistent with aspects of Finnis's own theory. Finnis, after all, suggests that

²⁹ Compare, e.g., Finnis, *The Rights and Wrongs of Abortion*, 2 PHIL. & PUB. AFF. 117, 131-40 (1973), reprinted in *THE PHILOSOPHY OF LAW* 141-50 (R. Dworkin ed. 1977) with Foot, *The Problem of the Doctrine of Double Effect*, 5 OXFORD REV. 5 (1967). Finnis recognizes that the ability to apply such absolute prohibitions depends on describing the causal structure of an act, distinguishing known effects from intended effects and choices-that-are-mine from foreseeable-consequences-of-my-act-that-I-do-not-however-choose. J. FINNIS, *supra* note 1, at 122-24. His own interpretation of the causal structure leads him to condemn suicide (always), see Finnis, *supra*, at 129-31, reprinted in *THE PHILOSOPHY OF LAW*, *supra*, at 138-39, and abortion (in many cases, even to save the mother), *id.* at 125-26, 131-32, 143-45, reprinted in *THE PHILOSOPHY OF LAW*, *supra*, at 134-35, 143-44, 148, as well as the entire deterrent strategy of the modern nuclear era, see J. FINNIS, *supra* note 1, at 224-25.

³⁰ See *supra* note 7.

³¹ A recent work aimed at resolving a problem related to this particular ambiguity in utilitarian theory, D. REGAN, *UTILITARIANISM AND COOPERATION* (1980), appeared at about the same time as *Natural Law and Natural Rights*; Finnis does not consider it.

³² See J. FINNIS, *supra* note 1, at 112-17.

³³ *Id.* at 112-14.

³⁴ See, e.g., *UTILITARIANISM AND BEYOND* (A. Sen & B. Williams eds. 1982) (including essays defending as well as criticizing utilitarianism).

each individual has a package of goods appropriate for his own particular character, inclinations, and desires.³⁵ That implies that an individual, through careful, reasoned attention to his own nature, could exclude numerous "packages" of goods, selecting, in consequentialist fashion, just the "best" for him. Many different ways of flourishing might remain, but under a consequentialist approach, that is just a way of saying that many packages "tie" for best, making choice among them a matter of ethical indifference. We would still have a consequentialist theory, even though it is not one that insists on reducing goods to a commensurable unit. Finnis, in short, is correct in noting, as others have, that consequentialists pay too much attention to the problem of how to maximize and not enough to the question of what to maximize—the nature of the good. But there is no reason why the consequentialist cannot use Finnis's own technique—direct apprehension by reason—for deciding what is good and which packages of goods are thus "best." The consequentialist does not need the hypothesis of fully commensurate units.³⁶

Finnis's response to the fact of controversy in these areas now takes a second form. He does not deny that there is disagreement. On the contrary, he admits that the methodological requirements, unlike the basic forms of good, have never been claimed by natural law theorists to be "clearly recognized by all or even most people."³⁷ He even concedes that the consensus is against him on such questions as the existence of absolute human rights.³⁸ The response now is to deny the assumption that the disagreement is among "equally rational" human beings. Relying on Aristotle and

³⁵ For example, although knowledge is always and objectively a good, it is not appropriate for everyone to give priority in his life to knowledge and become a scholar. J. FINNIS, *supra* note 1, at 106.

³⁶ If it be objected that on this view "Reason" is doing all the work, with nothing left for the consequentialist to do with his theory, that objection is no more applicable here than it would be in any other case. The essence of consequentialism is just the idea that we decide what to do by following the injunction to bring about the most "good" that we can. Any consequentialist will then have to explain what "good" we are trying to maximize. That explanation will require reasoned attention to human nature and relevant facts about what life and the world are like. A utilitarian who suggests that "pleasure" is the good, defends the proposition by reason, not by appeal to the consequentialist strategy itself. So a consequentialist who takes a more sophisticated view of what things are "good" and denies that there is a commensurable unit for comparing them may still rely on comparing them directly through reason; he then follows the consequentialist strategy in urging one to select the "best" package of goods for a particular individual. I see no reason why Finnis's own theory can't be fit into this "consequentialist" model.

³⁷ J. FINNIS, *supra* note 1, at 225.

³⁸ *Id.*

Aquinas for support, Finnis explains that only those sufficiently experienced, wise, of good habits, with the right and unbiased attitude, etc., will be able to judge soundly.³⁹ When one realizes how much this response is like some standard religious explanations—only those who have prepared themselves, through study, etc., can expect “revelation”—one begins to suspect that the unsavory natural law connotations have been severed only to be reintroduced in another guise. Presumably, it is more compatible with modern notions to be told that one’s failure to judge soundly results from a kind of immaturity, rather than from a lack of Grace.

I do not mean to suggest that Finnis is wrong in the claims he makes for reason. Indeed, no other philosopher has ever had better success in *demonstrating* what is right. The value of Finnis’s approach lies in reminding us that if we worry too much about how to prove our value judgments, we may become paralyzed—like the centipede trying to figure out how it walks—forgetting how much we *do* know even though we cannot prove it. Still, it would have been helpful if Finnis had paid a little more attention both to the problem of moral proof and to the difficulties associated with “self-evident” as the answer to the question “how do you know.”

What little Finnis does say about self-evidence and the way reason “just sees” the truth occurs in his discussion of the basic values, particularly the chapter on the value of knowledge.⁴⁰ Now no one reading this essay is likely to disagree with Finnis’s repeated insistence that it is *obvious* (why, then, must he say it as often as thrice within the space of a page?) that knowledge is a good—that it is better to be “well-informed” than to be “muddled, deluded, and ignorant.”⁴¹ But Finnis also wants to buttress the argument from self-evidence with another, claiming that the skeptic who asserts that knowledge is not a good refutes himself:

For one who makes such an assertion, intending it as a serious contribution to rational discussion, is implicitly committed to the proposition that he believes his assertion is worth making, and worth making *qua* true; he thus is committed to the pro-

³⁹ *Id.* at 100-01.

⁴⁰ *Id.* ch. III.

⁴¹ *Id.* at 72. There is already some distortion in the argument here. To be “muddled” or “deluded,” which suggests confused or false opinions, is not the same as to be in that “blissful state of innocence” that is ignorance and that poets sometimes praise in myth and anthropologists and environmentalists sometimes praise in primitive tribes.

position that he believes that truth is a good worth pursuing or knowing.⁴²

But why must the skeptic intend his contribution to be a "serious" one? The modern skeptic need not run through the streets shouting "eureka" to announce his discovery. He can simply shrug and say that all is permitted; he allows those who do take rational discussion seriously to decide what to do about the truth he claims to have discovered, namely, that even truth is not worth seeking. Presumably the skeptic is implying that he would not undertake the search again, having discovered at its end that even the one truth that he did discover was not worth the effort. But he can announce his discovery without commitment and let others decide for themselves whether to believe him; he doesn't have to care about persuading them.⁴³

If there is disquiet enough in Finnis's own account of self-evidence to lead to this sort of attempt to make denial of his claims "self-refuting," one wonders whether it would have been better to avoid the proof question altogether. That would still leave us with a valuable discussion of the good, though perhaps with less distinction between the pulpit and the philosopher as source of wisdom than we are wont to acknowledge.

II. NATURAL LAW AS LEGAL THEORY

A. Confusing a Theory by Definition

When the phrase "natural law" is used in jurisprudence it almost always refers to the claim, in opposition to positivism, that there is a necessary connection between law and morals. Now it is clear that one can assert such a connection without implying that the "morality" connected to "law" is a natural law morality. If by natural law one simply means a theory that claims that values are objective, it might seem that there is at least a partial connection: there would be no point in suggesting moral tests for what counts

⁴² *Id.* at 74-75.

⁴³ In a lengthier version of his self-refutation argument, Finnis defines "assertion" so that it entails commitment to and caring about what one asserts. See Finnis, *Scepticism, Self-Refutation, and the Good of Truth*, in *LAW, MORALITY, AND SOCIETY* 247, 253-54, 261-62 (P. Hacker & J. Raz eds. 1977). That, of course, makes his argument analytic and trivial. The only defense for the critical claim that "to assert" implies caring about the truth of the assertion is that nobody would otherwise take the speaker seriously. But why should that be so? The discoveries of nihilistic scientists are not disregarded, and if they are, so much the worse for us. Why should the matter be different in the case of moral truth, unless, like the emotivists, one believes that nothing but the ability to persuade is at stake.

as law unless those tests were in some sense "real" or objective. But even the moral relativist or emotivist, say, who claims that value statements are just personal expressions of approval or disapproval could still be a natural law *legal* theorist. He could, that is, insist that we identify systems as "legal" if and only if certain people express approval of the basic rules of the system. Like some natural lawyers, he could then say that directives that are very evil are not law, though by "evil" he just means intensely disapproved by the relevant group, not evil "in fact."

This lack of connection between one's legal theory and one's moral theory is even clearer when considered from the viewpoint of the legal positivist. The positivist who claims that law is determined simply by pedigree or source is not thereby committed to any particular moral theory when he concludes, *qua* moral philosopher now, that some of these laws are very "evil" and inspire no moral obligation. The positivist, in short, could be a natural law moral theorist, subscribing to every detail of Finnis's moral theory, while still remaining a positivist when it comes to legal theory.

How does this apparent lack of connection between legal and moral *theory* bear on the separate question whether an adequate *legal* theory must recognize a connection between law and morals? The answer to that seems to depend on the kind of connection that is asserted. If the connection is in the form of the natural law slogan that "unjust law is not law," then the distinction between legal and moral theory is by itself enough to show that the slogan is untenable if taken literally. Indeed, as has often been noted, the slogan flaunts its own contradiction: to say that unjust law is not law "assumes that there is a subject to which the predicate 'immoral' can attach and thus seems to concede that there are *formal* tests for legal validity"44 Only if the phenomenon passes the formal test can the substantive (moral) test come into play.

The very obviousness of this contradiction should have been enough to alert early positivists who took such delight in attacking the slogan to see in it an attempt to express a different idea from that of providing criteria for validity. A classical natural law theorist such as Aquinas was never interested in the positivist's concern to identify the essence of law. The classical problem from the beginning was not to define law but to explain the moral consequences of the fact that something was law. And that, says Fin-

⁴⁴ Soper, *Legal Theory and the Obligation of a Judge*, 75 MICH. L. REV. 473, 518 (1977).

nis,⁴⁵ is all that Aquinas was doing. First, Aquinas shows how the positive law, despite its human origin, can add to obligations whose roots are otherwise found exclusively in moral or religious law. The merely *malum prohibitum* becomes *malum in se* by virtue of the lawmaker's decision. But second, there must be a limit to this power of man to make his own will the source of obligation, and that limit is reached when man's will conflicts with God's, with what is already *malum in se* by reference to moral or religious law. Hence, "man-made law" that is unjust is not "God's law": it does not morally obligate.⁴⁶ That is all the "slogan" says, and in this form it is a statement that even the positivist can accept. Aquinas, it turns out, was writing moral theory, not legal theory, telling us only what many a positivist will also affirm: some laws are too evil to be obeyed.

Now if Finnis is willing to defend this interpretation of Aquinas and to rid his own legal theory of the idea that morality is relevant to determining legal *validity*, why shouldn't we conclude the same thing of Finnis, that he too is offering only moral theory, not legal theory?

B. Law Without Obligation

Finnis's own claims about the connection between law and morals are in fact strikingly similar to those sketched in the above interpretation of Aquinas, with "reason" substituted for "God." Finnis first develops an account of obligation and authority that explains why *de facto* authority can be legitimate (*de jure*) and thus yield moral obligation. The argument is fairly straightforward: (1) the common good is one of the requirements of practical reasonableness; (2) in most cases the common good can be advanced only by someone's being in charge—by somebody in fact having the power to choose one of the many possible and equally reasonable solutions to the coordination problems of a community; (3) therefore, the mere fact that someone is in charge *de facto*, directing solutions to these coordination problems, gives his solutions legitimacy. It is practical reason that establishes legitimacy, not any social contract or other *de facto* device. From this account, Finnis derives a moral obligation to obey the law, founded on reason's recognition that such obedience advances the common good.⁴⁷

⁴⁵ J. FINNIS, *supra* note 1, at 364 & n.13.

⁴⁶ *Id.* at 363-66.

⁴⁷ *Id.* at 314-20.

At this point one might object that if it is the effect on the common good that grounds the obligation, it is not an obligation to obey law *per se*, but only law when it in fact advances the common good. Thus, when the utilitarian attempts to ground obligation by suggesting that disobedience will have undesirable effects on the legal system, the usual answer is that not all such acts have undesirable effects. Thus the only obligation established is at best an obligation to obey when it is optimal to do so—not just because it is the law.⁴⁸

Finnis's response to this sort of objection points in inconsistent directions. First he suggests a Kantian view of reason and obligation that refuses to make consequential calculations critical in determining moral duty. Thus in the case of both promises and law, my obligation does not disappear just because it is true that in any particular case, breaking the promise or the law will have no effect on the valuable practice of promising or of having a legal system. Even if I go undetected, I will be choosing against the common good and thus against what reason tells me I should do.⁴⁹ If one stopped here, one would think that Finnis is saying that there is always a moral obligation to obey the law, regardless of individual calculations of whether in a particular case obedience or disobedience would better promote the common good.

But Finnis retreats from this conclusion in the end by making the moral authority of law only "presumptive."⁵⁰ The ruler's authority derives from the presumption that it is for the common good that someone should be issuing coordinating directions. When those directions depart sufficiently from the common good, the *de jure* authority is lost. There is no moral obligation at all (even *prima facie*) to obey the unjust law simply because it is law, although there may be other moral considerations that obligate me to comply.⁵¹

Thus far, nothing alters our conclusion that Finnis is still sim-

⁴⁸ See, e.g., Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 964-69 (1973).

⁴⁹ J. FINNIS, *supra* note 1, at 302-04. But one might ask whether in fact I choose against the common good if there is no damage to the institution of promise or legal system.

⁵⁰ *Id.* at 359.

⁵¹ *Id.* at 359-61. This account still leaves the ruler a great deal of room for choice without losing his moral authority. Thus presumptive obligation remains, even though another individual would have chosen a different solution, or even if the law is one the individual would not regard as "sensible." *Id.* at 289-90. As long as the rules are consistent with the basic requirements of practical reasonableness (the kind of rules that "a practically reasonable subject, with the common good in view, would think he *ought* to consent to," *id.* at 251 (emphasis in original)), there is obligation.

ply offering moral theory and that nothing here would disturb the legal positivist. Moreover, the moral theory as just described even supports the currently fashionable conclusion that there is no obligation (even *prima facie*) to obey the law *qua* law.⁵² For if by law one means the ruler's directions, these will not obligate at all if sufficiently inconsistent with the common good.

Finnis, however, seems to want to say that he is also giving us a legal theory. Thus he offers a "definition of law" that incorporates the requirement that law be consistent with the requirements of practical reasonableness.⁵³ He spends the next two pages denying that he means thereby to rule out as nonlaws those that do not meet his definition.⁵⁴ What kind of definition is this, then, and in what sense is Finnis still justified in claiming that he is doing legal theory as well as moral theory?

Finnis keeps returning to this problem, as if aware of the difficulty he has in admitting the positivist's main point while still trying to present his natural law moral theory as if it has something to do with the definition of law. In a final effort to explain why his is also legal theory, he seems to take issue only with H.L.A. Hart's suggestion that the study of these moral questions belongs to another discipline.⁵⁵ But when Hart suggested that these questions belong to another discipline, he was not trying to banish moral philosophy but only to maintain the distinction between moral and legal theory. If Finnis's only point is that a "complete" jurisprudence requires a chapter on moral theory as well as a chapter on legal theory, few positivists would disagree. But if Hart has done only half, Finnis also has done only half—the moral half, leaving us still to ask what there is here that addresses the peculiar question in legal theory concerning the relation between law and morals.

I believe that this reaction to Finnis is likely to be a very com-

⁵² One commentator, who himself defends the view that there is no *prima facie* obligation to obey law, suggests that this conclusion is "becoming more popular." Raz, *Authority and Consent*, 67 VA. L. REV. 103, 103 (1981). See also J. RAZ, *THE AUTHORITY OF LAW* 233 (1979); A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); A. WOOLLEY, *LAW AND OBEDIENCE: THE ARGUMENTS OF PLATO'S Crito* (1979); Smith, *supra* note 48, at 950. But see P. SOPER, *A Theory of Law* (unpublished manuscript; forthcoming spring 1984).

⁵³ No one will ever be able to put Finnis's "definition" of law in slogan form: the definition is contained in a sentence of more than 140 words that runs a full paragraph and refers to almost every related aspect of law that Finnis has discussed in preceding chapters. See J. FINNIS, *supra* note 1, at 276-77.

⁵⁴ *Id.* at 277-79.

⁵⁵ *Id.* at 357-61 (citing H.L.A. HART, *THE CONCEPT OF LAW* 156-57, 202, 206-07 (1961)).

mon one.⁵⁶ But I also believe that there is a sense in which a theory about the moral authority of law can be connected to a theory about the nature of law. Finnis's explanation of this connection is radically incomplete and is weakened by his continual concessions to the power of the positivists' formal definition of law in contrast to the apparently limited purpose served by Finnis's "moral" definition. In the remainder of this essay I shall develop the connection that Finnis should have made and show how that connection suggests that his moral theory is itself too strict in the criteria it establishes for *prima facie* obligation to obey.

III. THE PROBLEM OF DEFINITION

A. Elements

To raise the problem of definition is to touch upon an immense literature that ultimately leads beyond both legal and moral theory into a morass of metaphysics. Undaunted, let us begin with a simple example to illustrate the most commonly recognized elements of the problem.

1. *The Pre-analytic Phenomenon.* If you and I are debating whether to call a love seat a "chair" (rather than, say, a "couch"), we must first agree on the phenomenon we are trying to define. If you do not know what a love seat is, I can point to one, or I can describe it with language you and I already share (a piece of furniture just large enough to accommodate two adults, sitting side-by-side). But what is the pre-analytic phenomenon in the case of law? Obviously, we can't point to the thing or bring it into the room to analyze or describe as we might in the case of the love seat. And almost all legal theorists agree that we cannot simply take as the pre-analytic phenomenon everything that is referred to in ordinary language as "law." (That would include "laws" of nature and other obviously unintended referents.) We face the danger at the outset, then, that subsequent disputes about the proper description or definition of "the thing" are not real disputes at all because we are talking about different things—like the blind men and the elephant.

A rough approximation of the pre-analytic phenomenon in the case of a legal system is that of organized social systems. We would want to add a few qualifiers, stressing that the system is effective

⁵⁶ See, e.g., Gavison, *Natural Law, Positivism, and the Limits of Jurisprudence: A Modern Round* (Book Review), 91 YALE L.J. 1250 (1982) (suggesting that Finnis's natural law and Raz's positivism are not really incompatible).

and purports to be comprehensive and supreme in a way that lets us exclude social clubs and similar lesser-included social systems as part of the data to be analyzed. But even with these qualifiers, we would find ourselves uncertain that this is indeed the phenomenon whose definition or description is at issue among legal theorists. Finnis, for example, seems to agree with some positivists, such as Raz, about the features that more or less identify the pre-analytic phenomenon.⁵⁷ But he takes explicit issue with others, such as Kelsen, who seem willing to count the despotic rule of a tribal chieftain as among the pre-analytic data.⁵⁸ Given this kind of disagreement about the very thing we are trying to describe, how does one guard against the possibility that subsequent disputes are simply the consequence of different starting points?

2. *Description vs. Definition.* One way to avoid this problem is to start at the other end, with the concept of "chair" rather than with the troublesome borderline case: select an example that everyone would agree is a "legal system," see what we can say about it, and then see whether the reasons we are sure it is a legal system help us decide what we should say about a particular borderline case, such as the despotic tribal society. Finally, recognize that there will always be borderlines and that the point of the theoretical enterprise is not to provide necessary and sufficient conditions for the use of a term, but to understand the features that typify the standard case.⁵⁹

But now we encounter a second problem. After we have described a standard social system and then the tribal chieftain's society, what is there left to do that is of any intellectual interest? Why not be content with these descriptions that show the extent to which the two societies resemble and differ from one another? To go on and say that one system is legal and the other is not adds no new information, although we may for convenience's sake decide to use the shorter label "legal system" as a synonym for a selected set of descriptive features.

Many sociologists and anthropologists take essentially this

⁵⁷ Compare J. FINNIS, *supra* note 1, at 266-70 (emphasizing comprehensiveness, purported supremacy, and self-regulating creative capacity) with J. RAZ, *supra* note 52, at 116-20 (observing that legal systems are comprehensive, claim supremacy, and are open).

⁵⁸ See J. FINNIS, *supra* note 1, at 5-6 (citing H. Kelsen, *GENERAL THEORY OF LAW AND STATE* 19-22 (1961)), 267 (distinguishing "legal" order from charismatic personal rule of a "sovereign" administering "palm-tree justice" by ad hoc decree).

⁵⁹ For an example of this approach, see H.L.A. HART, *THE CONCEPT OF LAW* 13-17 (1961).

view of legal theory:⁶⁰ the value of legal theory consists at best in the light it sheds on the descriptive features to look for in the societies we study. To insist that some of these features are "essential" to law adds at most only a lexicographer's convenient shorthand for the features we have already described.

3. *The Legitimacy of Definition.* Having reached this point, one answer remains for the theorist bent on selecting some of the descriptive features of a society as the "essence" of law. Definitions are tested by reference to human purposes and the impact on those purposes of two things: 1) the phenomenon in question; and 2) the prior classificatory scheme that language provides. Why do we have separate concepts for "chair" and "couch" in the first place rather than a single concept of "furniture" that can be variously described in terms of length, shape, size, etc.? One possibility is that we encounter the need for an object on which to recline as well as sit often enough to justify a separate concept for things that serve that purpose, saving us the need to repeat the more cumbersome description each time. If this is the most plausible explanation of the "latent principle which guides our use of [the words],"⁶¹ then we are well on our way to deciding some borderline cases, such as whether a love seat is a chair or a couch. If it is not long enough to accommodate the average recumbent body, it is probably better classified as a large chair rather than as a couch. If we begin to distinguish purposes uniquely served by the two-seater "large chair" that are important for us (or for a large subset of us, such as lovers) we may decide that we do need a new concept—hence "love seat": neither chair nor a couch (though like and unlike in the following ways . . .).⁶²

⁶⁰ See, e.g., Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086 (1972); Gibbs, *Definitions of Law and Empirical Questions*, 2 LAW & SOC'Y REV. 429 (1968).

⁶¹ H.L.A. HART, *supra* note 59, at 14.

⁶² There may be other "plausible" explanations of why we distinguish chairs from couches. The text focuses mainly on function. (Even with that focus, "chairs" may mean mainly one-seaters, so that the larger love seat is a "small couch.") One could also suggest that we "map" the world linguistically in response to certain "natural" ways of perceiving things, which might make relative "size" or "shape" as important as "function" in the case of chairs and couches. (Thus a stool is neither a chair nor a couch, though it is also a one-seater.) This suggestion is a way of using modern theories of cognitive psychology to buttress the "old-fashioned" idea of "natural essences." Whatever the explanation, the model of what we are trying to do when we defend a "real" definition, see R. ROBINSON, *DEFINITION* 16, 62, 149-51 (1954), remains the same. We look for the latent principle of our existing classificatory scheme by considering the human "needs" (in the sense both of function and of "natural" human responses to the environment) that the scheme appears to serve.

In the case of "legal system," most modern theorists agree that it is "function" that provides the clue to the "latent principle" we are seeking. See J. FINNIS, *supra* note 1, at 6-

B. Finnis's Definitional Theory

It is here that Finnis's approach to the theory of definition begins to diverge from our model. Finnis, too, wants to start, not with borderline social systems or everything that ordinary usage refers to as "law," but with a "central case" or "focal meaning."⁶³ But a central case for Finnis is not just an example that everyone would agree is a legal system—not just any universally admitted example of a "chair," but an "ideal" chair, which Finnis seems to think is like Weber's "ideal-type."⁶⁴ This central case for Finnis, as we have seen, is a social system whose laws basically serve the common good and thus impose moral obligation.⁶⁵ He does not deny that other systems identified by other definitions are also legal (unless they are "despotic" tribes, which even Finnis rules out, though without argument⁶⁶). But he does claim that these other "definitions" focus on "peripheral" cases.⁶⁷

Now this is very curious indeed. It is as if one said that since the most important interest in a chair is comfort, then the central case for the theorist is the nicely-padded recliner. True, straight-backed wooden things are also "chairs," but they lack the most important feature. No wonder Finnis seems not to have engaged the positivist at all. We may all agree that moral legal systems are to be preferred to immoral ones, as comfortable chairs are to uncomfortable ones. But if we also all agree that all of these are instances of legal systems (or chairs), then the definitional point surely goes to the positivist.

Finnis's argument involves an equivocation on the term "evaluation." He defends his "definition" by insisting that evaluation must occur along with description whenever we select certain features of social systems as "important" for purposes of a theory.⁶⁸

7.

⁶³ J. FINNIS, *supra* note 1, at 9-11.

⁶⁴ *Id.* at 9. This is not the place to discuss whether Finnis has correctly enlisted Weber's theory of the "ideal-type" in support of his own effort to demonstrate that one cannot define or describe without also "evaluating," *see id.* at 3-6. Finnis himself seems to invoke Weber only for the suggested methodology, admitting that Weber's recognition of the "necessity" of evaluation in connection with description falls far short of what Finnis is suggesting the legal theorist "must" do. *See id.* at 21 endnote I.4. *See also infra* note 68.

⁶⁵ *See supra* text preceding note 47.

⁶⁶ J. FINNIS, *supra* note 1, at 6. *See also supra* note 58 and accompanying text.

⁶⁷ J. FINNIS, *supra* note 1, at 11, 277-81.

⁶⁸ The claim that one must evaluate in identifying some features as more important than others involves its own equivocation. Some descriptive scientists insist that the theorist can describe the ideals or important purposes of others, without himself subscribing to or endorsing those purposes. *See, e.g.,* Black, *supra* note 60, at 1094-95. The question of the

From that idea Finnis seems to say that since the estimate of "importance" can never be avoided, the theorist might as well proceed to examine what, for many, is the *most* important thing—namely moral obligation (the dictates of practical reasonableness), as applied to legal systems.⁶⁹ "Importance" here is clearly being used in two different senses—in the first place to justify a classification, and in the second place to explain *within the classification* an additional evaluative element. Thus, even if everyone agreed that the most important thing about chairs is how comfortable they are, that hardly implies that comfort is the most important thing in deciding whether something is a chair.

But Finnis is not alone in making this mistake; indeed in one respect he is correct in claiming that his definition is no more arbitrary than that of many current positivists who give alternative and similar explanations of what is "important" about law. As Finnis puts it, the question is whose viewpoint does one consider in looking for the "central" case of law.⁷⁰ Hart, he notes, decided that the "internal viewpoint" of one who accepts the rules as a standard for conduct is important, thus criticizing Austin's attempt to make critical the viewpoint of the citizen whose only concern is to avoid the sanction.⁷¹ Raz takes as critical the viewpoint of the judge who, Raz claims, must present the law as morally justified (whether the judge in fact believes it to be justified or not).⁷² Finnis calls these viewpoints "unstable" and parasitic on the viewpoint of the moral citizen, for whom the important question is the circumstances under which law does in fact morally obligate him.⁷³

If all of these various viewpoints are simply alternative descriptions of possible central cases to take as the starting point for analysis, Finnis is surely correct that his selection is no more arbitrary than Hart's or Raz's. But all of these "viewpoints" about what is important involve the same equivocation. At issue in the case of definition is not what a person with a certain viewpoint thinks is important about law, but what such a person thinks is

possibility of "value-free" science has too many meanings for Finnis blithely to assume that those who deny the possibility necessarily mean to commit the descriptive scientist to thoroughgoing *personal* evaluation of the ideals he is describing. Thus some people who deny the possibility of "value-free" description mean only to say that the scientist brings his values to bear on such things as what to select for study and, perhaps, that the scientist's "values" affect his "cognitive" perceptions.

⁶⁹ See J. FINNIS, *supra* note 1, at 14-15, 278-80.

⁷⁰ *Id.* at 11-18.

⁷¹ *Id.* at 12-13.

⁷² *Id.*

⁷³ *Id.* at 13-14.

important in classifying something as law. Some people might think the most important thing about chairs is color, not comfort, and thus nominate a different candidate for the central case. But that does not mean that they have a different idea about what is important in deciding what a chair *is*. Similarly, the moral citizen will have one view about the important thing in connection with law (do I have a moral obligation to obey it?); the "puzzled" or "ignorant" man who just wants to know what others expect will have another view (what must I do to conform?); and the "bad man" whose only interest is the sanction will have yet a third (what will happen to me if I do/don't obey?). But all these people might still agree on what the important thing is in classifying a system as legal.

C. Modern Positivism: The Demise of Definition

What, then, is the important thing in classifying a system as "legal"? Our chair example seems relatively simple. "Internal" attitudes about other important aspects of chairs all seem unrelated to the definitional problem because it seems easy to see that chairs are mainly for sitting,⁷⁴ however much we may recognize other interests in such things as color or comfort. What are legal systems mainly for? The pre-analytic phenomenon suggests that it is social control that interests us. That is the "furniture" concept. If we look for other possible interests that might lead us to further differentiate this general concept of "organized social system," one possibility is the different means of exercising such control. What is the nature of the bond that makes this society both effective and a system (instead of a coincidental convergence of behavior)?

The strongest and most appealing answer to this question is that of the classical positivist. Force and coercion are the bond, and the widespread prudential interest in avoiding sanctions easily explains why one might want to mark off those social systems that back directives with effective threats of force from those that do not. Like moral philosophers who define "primary goods" as things everyone desires, whatever else might be desired (thus avoiding the problem of specifying the full range of things people might or ought to want), so Austin and Bentham can be seen as defending the coercive view of law (the bad man's viewpoint): whatever else one is interested in, everyone at least wants to know the prudential consequences of disobedience. (If one is also interested in the

⁷⁴ *But see supra* note 62.

moral relevance of the fact that something is law or in the social expectations that go with something being law, let him go to the priest or the moral philosopher or the sociologist, not to the legal theorist or the lawyer.)

But modern positivism is not happy with Austin's answer. Ever since Hart, positivists have wrestled with describing the "normative" element of law as well as the coercive, insisting that we must take account of the special interests of those whose allegiance to the system is voluntary.

As a descriptive problem, this can be a useful and fascinating inquiry: what does one look for in law if one's allegiance is voluntary? (What does one look for in chairs if one's interest is aesthetic?) The answer as Hart gives it does not require a great deal of investigation or introspection, for it is almost a definition of "voluntary": uncoerced allegiance occurs for any number of reasons, ranging from self-interest all the way up to the belief that the laws are morally justified.⁷⁵ But if all of this is simply description from various viewpoints, then Finnis is still right. He might as well proceed to ask what law must look like from the viewpoint of the person whose focal concern is with social systems that are consistent with the principles of practical reasonableness.

If modern positivism is to be in any better position than Finnis as a matter of "definition," we must explain why it is important to include the idea of voluntary allegiance (at least among officials) along with the idea of coercion as essential to "law." What general human purpose or interest would explain including respect for such social standards apart from their coercive aspect?

The only answer to this question in Hart is the suggestion that the "puzzled" or "ignorant" person might want to conform to society's expectations without regard for accompanying sanctions.⁷⁶ But to make the interests of the "would-be-conformist" so important seems out of line with common experience. Everyone has an interest in avoiding organized sanctions, but few people actually pass themselves off as conformists, simply for the sake of conforming. The concern not to commit a social *faux pas* ranks so far below the concern not to be punished that, forced to choose be-

⁷⁵ H.L.A. HART, *supra* note 59, at 198. Raz quarrels with Hart on this point: voluntary allegiance (by judges) is taken (within the legal system) to mean allegiance for moral reasons (though an insincere judge may hide his true motivations). See H.L.A. HART, *supra* note 21, at 155-56, citing J. RAZ, *supra* note 52, 155 & n.13; J. RAZ, PRACTICAL REASON AND NORMS 147-48 (1975); J. RAZ, THE CONCEPT OF A LEGAL SYSTEM 235 (2d ed. 1980).

⁷⁶ H.L.A. HART, *supra* note 59, at 39.

tween Austin and Hart, Austin's "bad man" seems the preferable choice of point of view *with respect to the classification question*.⁷⁷ At best, the puzzled man is like the person whose main interest in chairs is comfort: he doesn't "define" chair by reference to that interest, even though he may make it the main, perhaps exclusive, consideration in selecting among chairs. So, too, the would-be conformist may well be interested in law primarily as a clue to official expectations, but that is no reason to think that he would deny that the main interest in deciding what law *is* is the one identified by Austin.

If we cast about for other persistent human interests to explain why we might distinguish social systems according to the type of cohesive bond, the most plausible alternative candidate to the "bad man" is the "moral man." All of human history (let alone moral philosophy) attests to the seriousness of that interest. So Finnis would have been on the right track if he had asked us to consider whether perhaps we use "legal system" precisely to denote organized social systems that entail *prima facie* moral obligation, distinguishing such systems from "coercive systems" (which entail no obligation) on the one hand, and from "moral systems" (which tell me what my ultimate obligation is) on the other. To see what one would have to do to defend such a claim, it will help again to see just why Finnis failed.

IV. CONNECTING LEGAL AND MORAL THEORY

After "defining" law to require consistency with moral requirements, Finnis concedes that we have no single term to represent the resulting thing he has described.⁷⁸ That concession is fatal to his enterprise. If we have no concept for social systems that obligate in the way Finnis describes, it strongly suggests that we do not have persistent human interests that have led us to devise a separate concept for such things. It suggests that Finnis's definition is like "comfortable chair," for which we also have no single concept because we do not run into the difference between comfortable and uncomfortable chairs either often enough or clearly enough to warrant a new concept, as we might, for example, in the case of a "love seat." In both cases, we are content to talk separately about which chairs are comfortable and which legal systems

⁷⁷ Note that a sociologist might well prefer a broader concept of law that emphasizes voluntary as well as coercive allegiance to social standards. But the utility of a technical concept for sociologists is not what is at stake in legal theory.

⁷⁸ J. FINNIS, *supra* note 1, at 281.

entail moral obligation to obey.

The preceding analysis indicates what one must do to show that the important thing in law for the moral man is also the important thing in explaining what we mean by "law." One has to stop conceding that other kinds of regimes—which do not entail *prima facie* moral obligation—are also "legal" regimes. One has to defend the claim that once we get beyond the purely coercive regime, all other standard examples of organized social systems that we are inclined to call "legal" can plausibly be said to yield at least *prima facie* moral obligation to obey. If we can do that, we will have an account that correlates our existing classificatory scheme with the interest of the moral man in seeking legitimacy.

The reason that Finnis balks at taking such a step, at claiming that his definition reveals the principle behind the existing use of the term "legal system," is that his political theory is too strict. In his theory, the obligation to obey arises in too few cases, leaving us with too many regimes that our prior classificatory scheme designates as "legal" despite the absence of moral authority. That is because Finnis has linked political obligation to his natural-law moral theory, which yields obligation only where rulers in fact achieve results by and large consistent with the common good.

It is also clear what we must do to bring the political theory in line with the idea that "law" refers only to regimes that morally obligate. We need to recognize the moral relevance of the fact of value disagreement. Even if we assume there are objectively correct moral answers, few people have the capacity of Aristotle to penetrate to them. In light of that fact, a theory of *prima facie* moral obligation to obey the law should build on the respect that is owing to people who are *trying* in good faith to rule for the common good, even though one might think that the actual rules depart from what that common good requires.

I have developed elsewhere⁷⁹ a political theory along these lines, arguing that there is *prima facie* moral obligation to obey whenever those in charge are *aiming* at the common good, however wide of the mark their shot may fall in fact. The more one is concerned with the problem of proof, which I have already suggested Finnis ignores, the stronger the case for just such a theory of obligation, focusing on sincerity and good faith effort rather than on actual result.

I shall not defend this political theory in detail here. I shall,

⁷⁹ P. Soper, *supra* note 52.

however, indicate how such a theory promises to erase the gap between our existing classificatory scheme and the moral authority that Finnis, like other natural law legal theorists, wants to include as part of the meaning of "legal system." The gap is erased if we can defend the following propositions:

(1) It is both necessary and sufficient for *prima facie* moral obligation that the rulers of an organized social system believe they are aiming at the common good;

(2) Most organized social systems that we call legal are in fact governed by rulers who believe they are aiming at the common good;

(3) Therefore, most organized social systems that we call legal also have minimal moral authority—a conclusion that supports the alleged connection between the functional interest in moral legitimacy and the question of what we mean by "legal system."

The first of these is the proposition of political theory that I have already contrasted with Finnis's more restrictive theory. The second is an empirical proposition both about our existing use of language (the term "legal system") and about the attitudes of rulers in most organized social systems. I shall not defend the empirical claim except to note how it avoids the most cogent argument of the positivist against most other attempts to link the concepts of law and legitimacy. Such links fail because the positivist sees or can imagine many regimes that are immoral in fact and yet legal (according to the existing language scheme). That is Finnis's problem, too, which is why he cannot rule out other uses of the term "law." We cannot escape this problem by simply changing the classificatory scheme wholesale and stipulating that only regimes that are moral will be called "legal." That would avoid the issue of what we mean *now* by this term (what *is* the latent principle). But if political theory can demonstrate that moral authority exists wherever there is belief in justice (rather than justice in fact), the positivist will have far fewer counterexamples from our existing language scheme to challenge the alleged definitional connection between "law" and "morality." However easy it may be to find favorite examples of "legal systems" that are immoral *in fact*—Tsarist Russia, South Africa, Nazi Germany—it is not nearly so easy to deny that officials in these regimes at least believe(d) that they are (were) doing what is (morally) right. If that is the question that political theory makes relevant to moral authority, we will find few existing or historical examples of organized social sys-

tems that we would clearly call legal, but that have no moral authority whatsoever.⁸⁰

In addition to establishing a definitional connection between law and morality, a political theory of the sort described has a second potential consequence. It threatens to make legal theory a species of moral theory. We would be able to apply a definition of "law" only by actually engaging in moral (political) theory to vindicate the claim that the term has been properly applied to a regime that has a legitimate claim to moral fidelity, distinguishing such regimes from those whose only claim on citizens is coercive. But is such a strong conclusion necessary? Is there no independent sense in which one can do legal theory without finding oneself necessarily drawn into substantive moral theory? To answer that question requires a last look at modern positivism.

V. OUTSIDERS AND INSIDERS

Joseph Raz's version of positivism provides a vantage point for considering the question of independent status for legal theory.⁸¹ Raz, as we have noted,⁸² seems to agree that the idea of law entails the idea that the laws are thought to be morally justified. A judge who uses language of legal duty and legal obligation may not himself believe that the duty is consistent with morality, but the system in which he makes such statements interprets them that way. Thus he will have to hide his own belief or no longer act as "judge." In one sense, Raz's claim is strong support for the thesis we have just developed—that "law" is a term that insiders (judges at least) use to designate social controls that are thought to be morally justified. How then can Raz's theory remain positivist and aloof from substantive questions of moral philosophy?

A. Belief and Reality

The answer to that requires one to consider the position of the theorist who purports to remain outside and "detached" from the

⁸⁰ The only such example that comes to mind is the admittedly self-interested rule of a despotic sovereign. See *supra* note 58 and accompanying text. But there are few examples of these, and sufficient doubt about whether we *would* call them "legal," see *id.*, to leave the plausibility of the moral definition intact.

⁸¹ For those aspects of Raz's theory on which I now focus, see generally J. RAZ, *supra* note 52, especially chs. 4 & 8. The specific dispute between Raz and Hart over how to "describe" the normative aspect of law can best be followed by considering Hart's recent defense of his view against Raz's in H.L.A. HART, *supra* note 21, at 153-61.

⁸² See *supra* note 75. See also *supra* note 81.

description and analysis he offers. Raz can claim that "law" is used in the way just indicated, without yet expressing an opinion whether in any particular case it is correctly so used. Insiders think that "legal" regimes are morally justified. Whether in fact they are is a separate matter. Legal theory is concerned with meanings and has accomplished its task once it has connected the idea of law with the idea of justified normativity. It then vacates the field for moral and political philosophers to tell us whether the systems that we think are legal are in fact normatively justified. Indeed, when Raz himself turns to moral philosophy, he concludes that there is no *prima facie* obligation to obey the law;⁸³ presumably the "meaning" we attach to law is a meaning that would not justify judges calling their own system legal simply because it was an organized social system—they would also have to endorse its content as moral (or pretend that it is). Insider-judges, in short, could not use and apply Raz's definition of law in their own systems without confronting (or pretending to confront) the substantive questions of moral philosophy.

But the legal positivist is not an insider. He can accept the above "semantic thesis" without accepting the corresponding "social thesis."⁸⁴ The positivist claims that the term can be correctly used and applied by outsiders without reference to substantive moral questions, even though the term as used by insiders may require such a confrontation. The closest analogy might be to a theorist's definition of religion as involving, say, a belief in the existence of God. That definition can be accurate without preventing the theorist, when he turns to the substantive question of whether God does exist, from deciding and arguing that the answer is no. Presumably, if the theorist in his substantive mode convinces everybody that there is no God, former believers will no longer have a "religion." That leaves the meaning of "religion" intact—indeed it vindicates the meaning, for once the belief is shattered, the application of the concept goes with it.

Try to apply the same analysis to law. If Raz, *qua* moral theorist, persuades us all that there is no moral obligation to obey law *qua* law, then one possibility is that we will no longer call all organized social systems (the pre-analytic phenomenon⁸⁵) "legal systems." We will restrict that term to those regimes that do morally obligate. Thus if only certain kinds of democratic regimes obligate,

⁸³ See *supra* note 52.

⁸⁴ See J. Raz, *supra* note 52, at 38-39, 155-59.

⁸⁵ See *supra* note 57 and accompanying text.

we may decide that henceforth only that kind will be called a "legal system." But of course there is a second possibility. We might dispute the substantive issue of whether in fact most of the "standard" organized social systems yield *prima facie* moral obligation. In either case, the substantive moral question would become an intricate part of the attempt to *apply* the theoretical definition in order to determine *even as outsiders* which systems are "legal."

The difference between the religion case and the legal case is this. In the religion case I suggested a definition that depended on the *belief* in God, not on the truth of the proposition that God exists—a belief-based concept. In the legal case, I am proposing a definition that depends on the truth in fact of the claim that a regime deserves moral fidelity—a reality-based concept. If Raz's theory of law rests on a belief-based concept, then he can maintain the distinction between legal and moral theory. Legal theory will tell us that "law" refers to regimes *believed* to be moral. Moral theory tells us which regimes are in fact moral. But if the concept of law is reality-based, this division is impossible. If what we mean by "law" is regimes that in fact morally obligate, not just regimes where that is believed to be the case, then the legal theorist in telling us which things are law will have to grapple with the very question that moral theory poses.

We could have done the same for religion. If what we mean by religion is not something characterized by the *belief* in God, but by the truth of the proposition that God exists, then again the theorist cannot maintain the distinction between detached analysis and substantive theological debate. If he now argues that God does not exist, the fact that he persuades people to believe him does not mean that they no longer have a religion: that will depend on whether they are right or not about God's existence. It is true that they won't *think* they have a religion, but they could, of course, be wrong.

So, too, in the case of law. If we mean to apply "law" to regimes that deserve fidelity *in fact*, then even if we are persuaded that a particular regime does not morally obligate, we still won't know whether it is legal until we know whether we have been correctly persuaded.

B. The Reality of Belief

How do we know which view of law is correct: do we mean by law "believed to be justified" or do we mean "justified in fact"? If this is our question, we seem to have an independent task for legal theory. But the choice between these meanings has very different

consequences for the ability of the theorist, after he has resolved *this* question, to keep his theory pure and free from substance. If a proper analysis of "law" reveals a belief-based concept, then we can "apply" and use the concept by simply taking account of certain social facts. (Where judges believe rules are justified, we have law. Where judges are all anarchists who come out of the closet and admit that the belief is nonsense, but continue to enforce the rules, we do not.) But where the concept is not belief-based, we cannot apply it to existing regimes until we face the substantive moral question.

Well which is it? In the case of religion, there are good reasons to think we are dealing with a belief-based concept. A person who did not believe in God could hardly be said to have a religion, even if we assume that he is wrong in his belief and that God does exist. Would we say the same where people (judges) do not believe in the justice of their regime and openly admit as much? Would we say that even if they are wrong—that the system really is just—there is no "legal system," just because they do not believe it to be just?

Well, if we are going to preserve any distinct concept of a completely coercive system—sovereigns issuing self-interested *ad hoc* decrees—we are not likely to decide that such systems become legal just because they accidentally happen now and then to achieve just results. We will go along for the result, perhaps, but not for the moral authority of the ruler—just as we may agree with the substantive goal of a terrorist though we do not acknowledge his authority to coerce our participation. If this is correct—if official belief in justice is a necessary condition for calling the system legal—it seems at first glance to support the conclusion that "law" like "religion" is a belief-based concept: neither concept applies in the absence of belief, regardless of the facts (actual moral authority of the directives, actual existence of God). But in the case of religion, we could imagine that God exists even though a person doesn't believe. In the case of law, we can't derive moral authority for the law (*qua* law) where the rulers don't believe they are aiming at the common good—not if the political theory sketched above is correct. If the political theory is correct, good faith official belief in justice is a necessary (and sufficient) condition for actual moral authority. Thus every case that could support the belief-based interpretation of "law," and thus separate legal and moral theory, turns out in fact to be a case in which the moral theory would yield the same result: not a "legal system" because the rulers are not sincere and thus have no moral authority.

Suppose we approach from the other direction—is belief a suf-

ficient as well as necessary condition for application of the concept? If a religious person believed in God, we would probably conclude that he had a religion, even though we were convinced his belief was false. That supports the belief-based model of "religion." What about judges who sincerely believe that what they are doing is just, but in fact are wrong: the system is unjust. Would we still want to say this is a legal system? Yes, but again not with a different result from the one we reach under political theory if the political theory makes good faith belief sufficient for *prima facie* moral obligation. The injustice of the system will be relevant to ultimate obligation, but not to *prima facie* obligation. This analysis suggests that the normal tests for deciding whether the concept is belief-based or reality-based are not available in law, if we assume that an adequate political theory, by making belief crucial to moral obligation, partly collapses the distinction between belief and reality.

This analysis also helps explain why positivism might have overlooked for so long the essential connection with moral theory. Even where we are dealing with reality-based concepts, we never have more than beliefs about that reality, and the beliefs might be wrong. Because legal theory is supposed to be an analysis of meaning, it shies away from the substantive questions that the reality-based concept would force it to answer. Because every reality-based concept can be used only in the *belief* that it is being used correctly, there is a distinct bias toward concluding that one is dealing after all with only a belief-based concept. Finally, when one is dealing with morality it does seem much easier to decide what people believe (ask them) than it is to decide what is the case (ask Reason?). All three factors explain the bias toward deciding that the concept of law is belief-based: it is easier to apply. But the positivist's predilection for certainty and ascertainability when it comes to identifying "laws" (or rules or orders or norms) *within* a society cannot be carried over to this general level of legal theory as a reason to prefer whichever "interpretation" is easier to apply. Such a presumption would beg the question—unless one assumes that we never have any concepts that are difficult to apply, which is obviously false. To defend such a presumption one would have to explain why we might care that "law" be used in a way that makes it easy to determine whether or not a particular regime is "legal." But if those further consequences are the moral obligation to obey, one has no reason to worry, as long as the concept of law is no more uncertain than the concept of morality.

The important point is that indifference about the uncertainty

of the concept "legal system" is entirely independent of the positivist's insistence on distinguishing, *within* a social system, those social standards that are easily ascertainable from those that are not. "Source" is critical for both the moral man and the bad man, which is simply a way of saying that the effectiveness of any system of social controls depends on efficient communication. But this internal interest in a certain guide to expected conduct does not apply to the external question of whether in classifying the various *means* of ensuring compliance (coercive, moral, etc.), we should use only concepts that are easy to apply. Indeed, if the argument here is correct, we have long been living quite comfortably with a concept of "legal system" that is as uncertain as the concept of "the morally legitimate" with which it is linked. The best evidence of that, as well as the best evidence that the two concepts are linked and are thus equally uncertain in application, is the unending debate about this very question within legal theory itself.